The following time limits apply to appeals under this part:

(1) Discovery requests must be served on the opposing party prior to the initial status conference.

(2) Responses to discovery requests must be served on the opposing party no later than 3 days after the initial status conference.

(3) Discovery motions, including motions to compel, must be filed no later than 5 days after the initial status conference.

(c) *Methods of discovery.* Parties may use one or more of the following methods of discovery provided under the Federal Rules of Civil Procedure:

(1) Written interrogatories;

(2) Requests for production of documents or things for inspection or copying;

(3) Requests for admissions.

(d) *Limits on discovery requests.* Absent approval by the administrative judge, discovery is limited as follows:

(1) Interrogatories may not exceed 10 in number, including all discrete subparts;

(2) The parties may not take depositions; and

(3) The parties may engage in only one round of discovery.

(e) *Administrative judge's discretion to alter discovery procedures.* An administrative judge may alter discovery procedures in order to provide for the expedited review of an appeal filed under this part.

§ 1210.13 Deadlines for filing motions.

(a) *Motions.* All non-discovery motions must be filed no later than 5 days after the initial status conference.

(b) *Objections.* Objections to motions must be filed no later than 2 days after the motion is filed.

(c) *Administrative judge's discretion to alter deadlines.* An administrative judge may exercise discretion to alter or waive these deadlines.

§ 1210.14 Sanctions for failure to meet deadlines.

Section 1201.43 of this chapter, which allows administrative judges to impose sanctions on parties that do not comply with orders or do not file pleadings in a timely fashion, shall apply to any appeal covered by this part. Strict enforcement of deadlines will be required to meet the 21-day deadline for issuance of a decision by the administrative judge.

§ 1210.15 Agency duty to assist in expedited review.

(a) As required by 38 U.S.C. 713(e)(6), the agency is required to provide the administrative judge such information and assistance as may be necessary to ensure that an appeal covered by this part is completed in an expedited manner.

(b) The agency must promptly notify the MSPB whenever it issues a Secretarial determination subject to appeal under this part. Such notification must include the location where the employee worked, the type of action taken, and the effective date of the action. Notification should be sent to *VASES@mspb.gov*.

§ 1210.16 Intervenors and amici curiae.

Intervenors and amici curiae are permitted to participate in proceedings under this part as allowed in § 1201.34 of this chapter. Motions to intervene and requests to participate as an amicus curiae must be filed at the earliest possible time, generally before the initial status conference. All intervenors and amici curiae must comply with the expedited procedures set forth in this part and all orders issued by the administrative judge. The deadlines applicable to the timely adjudication of cases under this part will not be extended to accommodate intervenors or amici curiae.

§ 1210.17 Hearings.

(a) *Right to a hearing.* An appellant has a right to a hearing as set forth in 5 U.S.C. 7701(a).

(b) *General.* Hearings may be held in-person, by video or by telephone at the discretion of the administrative judge.

(c) *Scheduling the hearing.* The administrative judge will set the hearing date during the initial status conference. A hearing generally will be scheduled to occur no later than 18 days after the appeal is filed.

(d) *Length of hearings.* Hearings generally will be limited to no more than 1 day. The administrative judge, at his

or her discretion, may allow for a longer hearing.

(e) *Court reporters.* The MSPB will contract for a court reporter to be present at hearings.

§ 1210.18 Burden of proof, standard of review, and penalty.

(a) *Agency.* Under 5 U.S.C. 7701(c)(1), and subject to exceptions stated in paragraph (c) of this section, the agency (the Department of Veterans Affairs) bears the burden of proving that an appellant engaged in misconduct, as defined by 38 U.S.C. 713(g)(2), or poor performance, and the Secretary's determination as to such misconduct or poor performance shall be sustained only if the factual reasons for the charge(s) are supported by a preponderance of the evidence. Proof of misconduct or poor performance shall create a presumption that the Secretary's decision to remove or transfer the appellant was warranted. The appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case. The following examples illustrate the application of this rule:

Example A. The Secretary determines that the appellant intentionally submitted false data on the agency's provision of medical care and that the misconduct warrants transfer to a General Schedule position. The appellant files an appeal with the Board. Following a hearing, the administrative judge finds that the agency proved its charge by preponderant evidence. The appellant's transfer is presumed to be warranted, absent a showing that such a penalty was unreasonable under the circumstances of the case.

Example B. The Secretary determines that the appellant's performance or misconduct warrants removal, but the notice of the decision and the agency's response file do not identify any factual reasons supporting the Secretary's determination. The appellant files an appeal with the Board. The administrative judge may not sustain the removal because the agency, in taking its action, provided no factual reasons in support of its charge(s).

Example C. The Secretary determines that the appellant's performance or misconduct warrants removal. The appellant files an appeal with the Board. During the processing of the appeal, the appellant contends that the agency unduly delayed or refused to engage in discovery. If the agency has obstructed the appeal from being adjudicated in a timely fashion, the administrative judge may impose sanctions, up to and including the drawing of adverse inferences or reversing the removal action. Because the administrative judge finds that the agency has not unduly delayed or refused to engage in discovery, he declines to impose sanctions and affirms the removal.

Example D. The Secretary decides to remove the appellant based on a charge that the appellant engaged in a minor infraction that occurred outside the workplace. The appellant files an appeal with the Board. Following a hearing, the administrative judge finds that the agency proved its charge and further finds that the appellant established that the penalty of removal was unreasonable under the circumstances of the case. The presumption that the Secretary's decision to remove was warranted is rebutted and the action is reversed.

(b) *Appellant.* The appellant has the burden of proof, by a preponderance of the evidence, concerning:

(1) Issues of jurisdiction;

(2) The timeliness of the appeal; and

(3) Affirmative defenses.

(c) *Affirmative defenses.* Under 5 U.S.C. 7701(c)(2), the Secretary's determination may not be sustained, even where the agency met the evidentiary standard stated in paragraph (a) of this section, if the appellant shows that:

(1) The agency, in rendering its determination, committed harmful error in the application of its procedures;

(2) The decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) The determination is not otherwise in accordance with law.

(d) *Penalty review.* As set forth in paragraph (a) of this section, proof of the agency's charge(s) by preponderant evidence creates a presumption that the Secretary's decision to remove or transfer the appellant was warranted. An appellant may rebut this presumption by establishing that the imposed penalty was unreasonable under the circumstances of the case, in which case the action is reversed. However, the administrative judge may not mitigate the Secretary's decision to remove or transfer the appellant.

[79 FR 48943, Aug. 19, 2014, as amended at 79 FR 49423, Aug. 21, 2014]

§ 1210.19 Bench decisions.

(a) *General.* The administrative judge may issue a bench decision at the close